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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GARY GREEN,

Petitioner,

v.

MAURICE P. FOLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PHILIP L. CHABOT, JR.
GRAD, TOOTHMAN, LOGAN & CHABOT, P.C.
Suite 800
1990 M Street, N.W.
Washington, D.C. 20036
(202) 737-5046
Counsel of Record

January 11, 1989

QUESTIONS PRESENTED

Whether the Court of Appeals abused its discretion and deprived Respondent of his right to a hearing in deciding the case below on factual issues raised for the first time after judgment and never litigated at the trial court level.

LIST OF PARTIES

The parties to this proceeding are Petitioner, Gary Green, and Respondent, Maurice P. Foley.

The same parties appeared in the proceedings below.

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The petitioner, Gary Green, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled proceeding on September 13, 1988.[1]

[1] Petitioner's Petition for Rehearing, Suggestion for Rehearing In Banc, and Motion To Supplement The Appellate Record were denied on October 14, 1988.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 856 F.2d 660 and is reprinted in the Appendix hereto, p. 3a, *infra.*

The memoranda decisions of the United States District Court for the Eastern District of Virginia (Bryan, C.D.J.) are unreported. They are reprinted in the Appendix hereto pp. 37a, 68a, 69a, *infra.*

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1331, the petitioner brought this suit in the United States District Court for the District of Maryland. On March 5, 1987, venue was changed, pursuant to 28 U.S.C. §1404, and the case transferred, in accordance with 28 U.S.C. §1391(a), to the United States District Court for the Eastern District of Virginia.

On July 22, 1987, acting on cross-motions for summary judgment, the Eastern District of Virginia granted partial summary judgment for petitioner and dismissed petitioner's remaining claims. On July 31, 1987, the district court denied respondent's Motion to Vacate Summary Judgment And Grant Rehearing And Reconsideration pursuant to Rule 59(e). On October 30, 1987, the district court denied respondent's Motion For Relief From Judgment pursuant to Rule 60(b)(3).

On respondent's consolidated appeals, the Fourth Circuit, on September 30, 1988, reversed the decisions of the Eastern District and remanded the case with instructions to enter judgment for respondent.

Petitioner's Petition For Rehearing, Suggestion For Rehearing In Banc, And Motion To Supplement The Appellate Record were denied on October 14, 1988.

The jurisdiction of this Court to review the decision and order of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of The United States provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Seventh Amendment to the Constitution of the United States provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law.

STATEMENT OF THE CASE

Respondent, Maurice P. Foley, together with Alan H. Silverstein and Stephen Zimpel, were partners in Fairfax Associates, Ltd.[2] ("Fairfax Associates"). Fairfax Associates was formed solely for the purpose of engaging in a single construction project, Fairfax Gardens Condominiums, which was completed at a loss.

On August 2, 1982, Fairfax Associates borrowed funds from Mount Vernon Savings and Loan Association ("Mount Vernon") (succeeded by Crossland Savings Bank) and gave a deed of trust note to Mount Vernon. Zimple, Foley and their wives executed a Guaranty Agreement, in which they assumed liability as guarantors of the Mount Vernon note.

On January 28, 1983, Foley and his wife executed a guaranty agreement with Virginia National Bank (succeeded by Sovran Bank) N.A. ("Sovran")), in which they assumed liability as guarantors on any loan made to Fairfax Associates up to a maximum of $221,500. On September 4, 1984, Fairfax Associates borrowed funds from Sovran. The loan was evidenced by a commercial note, and made subject to the Foleys' previous guaranty.

In the fall of 1984, Fairfax Associates was insolvent, had no operations, no funds or assets, and no conceivable ability to pay off its debts. Zimpel and Silverstein had each returned to the partnership whatever funds had been received by them and contributed substantial additional funds to pay partnership debts; however, Foley had refused to do the same, claiming a lack of funds. Fairfax Associates still owed approximately $275,000 to the

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[2] Zimpel and Foley were general partners, each with a forty percent interest. Silverstein was a limited partner with a twenty percent interest. Zimpel was Managing General Partner.

banks and this outstanding debt was having a negative impact on Silverstein's and Zimpel's other credit transactions.

Petitioner, Gary Green – a member of the Bar of this Court – represented Silverstein and Zimpel in legal matters unrelated to Fairfax Associates.[3] At their suggestion, Green offered to accept the two notes guaranteed by Foley as full and complete payment of $10,000 in outstanding legal fees,[4] provided the arrangement could be structured to the satisfaction of their local attorneys and the concerned banks.

On December 31, 1984, Zimpel and Silverstein purchased the Sovran note with a cashier's check in Green's name. The cashier's check was obtained with funds debited by Sovran directly from the personal accounts of Zimpel and Silverstein.[5]

Green received the notes from the bank and later sued Foley in the United States District Court for the District

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[3] Green's legal experience is primarily in the field of civil rights litigation and business strategy. He is not experienced in the area of banking or commercial paper, nor matters involving Virginia law. Affidavit of Gary Green, dated November 28, 1988, Pars. 2, 3, 7, 19; Appendix pp. 130a, *et seq.*, *Infra.* He retained Virginia counsel in connection with this action and relied upon the advice of counsel throughout. Green Aff., Pars. 32-37.

[4] The face value of the notes exceeded the amount due Green in fees; however, the notes were in default and Green believed, correctly, that Foley was insolvent. Green Aff., Par. 17.

[5] On the same day, funds from Zimpel's and Silverstein's personal accounts were placed into the bank account of Fairfax Associates. The funds were later withdrawn from the partnership account and returned to their personal accounts on January 2, 1985. Those funds played *no* role in the purchase of the notes. *See* Gunn Deposition at Appendix pp. 116a-129a, *Infra.*

of Maryland on August 22, 1986.[6] Jurisdiction was based upon diversity of citizenship, 28 U.S.C. §1331.

On or about October 23, 1986, Foley, invoking the provisions of Va. Code §49-25, made demand upon Green to institute suit for the collection of the two notes against the partnership as the principal debtor.[7] In response to this demand, Green filed suit against the partnership and the other guarantors on November 24, 1986 in the Circuit Court of Fairfax County, Virginia.

On Foley's motion for a change of venue, the federal action pending in Maryland against Foley was transferred to the United States District Court for the Eastern District of Virginia on March 5, 1987. The docket was opened in that court on April 13, 1987 and a scheduling order issued on May 1, 1987. Respondent filed his first discovery requests on June 3, 1987.

Green filed a motion for summary judgment on June 11, 1987. Foley filed a cross-motion for summary judgment the following day. In his brief, Foley acknowledged that he was aware that Silverstein and Zimpel had "arranged" the transaction by which the notes were sold to Green.[8]

The district court heard argument on these cross-motions on July 2, 1987. Green's counsel took the occasion to respond – four days early – to Foley's Request For

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[6] Green waited over a year and a half before taking any action to reduce the note to judgment.

[7] Green had no prior knowledge that such an action was required under Virginia law. Green Aff., Par. 36.

[8] Brief In Support Of Defendant's Motion For Summary Judgment, at 2.

Production Of Documents. The response included a letter, dated December 14, 1984, from Green to Silverstein and Zimpel, which set forth the terms of the arrangement by which Silverstein and Zimpel had purchased the notes on Green's behalf. Foley's deposition of Green, scheduled for July 2, 1988, never occurred.

On July 22, 1987, the district court denied the motions of both parties for summary judgment on the Mount Vernon note. The court, nonetheless, dismissed the claim as to the Mount Vernon note, without prejudice, becuase of Green's failure to prosecute the claim in state court as required by the Virginia Notice Statute, Va. Code §49-25 (1986). The court found that Foley had specifically waived that statutory right in the agreement he signed with regard to the Sovran note, however, and granted Green summary judgment on that claim.

On July 29, 1987, Foley filed a Motion To Vacate Summary Judgment and Grant Rehearing And Reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In his motion, Foley made three arguments. First, Foley claimed surprise as to the letter of December 14, and argued that the letter created a material issue of fact as to Green's status as a purchaser of the notes. Second, Foley argued that Green's response to Foley's motion should have been considered by the district court to be unopposed. Third, Foley argued that he did not anticipate that Green's counsel would assert that Foley had waived his rights under the Virginia Notice Statute.

On July 31, 1987, Foley's motion was denied on the ground that Foley had failed to establish that he had been unfairly prejudiced; the December 14 letter had no legal impact on or significance with regard to Green's right, as holder, to collect on the notes; and Foley had

cited no authority whatsoever to support his position that the Virginia Notice Statute had not been waived by the express terms of his guaranty agreement for the Sovran note.

Foley filed his appeal with the United States Court of Appeals for the Fourth Circuit on August 18, 1987.

While his appeal was pending, Foley took the deposition of Zimpel as part of the state court action on the Mount Vernon note. Foley later claimed that, during the course of this deposition, he

> determined, for the first time, that the promissory note and guarantee agreement . . . were *not* purchased from the payee bank by Green as Green alleged in his pleadings and motions in the District Court, but rather *paid off* with funds out of the account of Fairfax Associates, Ltd., the principal debtor on the note, by Foley's two partners, Mr. Zimpel and one Alan Silverstein.

Foley immediately requested the Court of Appeals to grant an extension of time within which to file his opening brief or, in the alternative, for a stay or remand due to extraordinary circumstances. Foley argued, in his motion, that Zimpel's testimony established that partnership funds had been used to pay off the notes, that the partnership was therefore discharged of the debt, and that Foley's liability on the guaranty was extinguished. Foley also argued that Green had misrepresented his status as a purchaser before the district court and that the court was "misled" into believing that Green had purchased the notes.

On October 21, 1987, Foley filed with the district court a Motion For Relief From Judgment under Rule 60(b)(3). In this motion, Foley argued that he had just learned in deposition of "misrepresentations" in Green's

pleadings and motions. Foley claimed that these "misrepresentations" had prevented him from asserting a meritorious defense to the suit against him.

On October 22, 1987, the circuit court stayed its briefing schedule pending the district court's consideration of Foley's "new" evidence.

On October 30, 1987, the district court conducted a hearing on Foley's second post-judgment motion. Foley presented excerpts from the Zimpel deposition, the bank records, and a chart purportedly describing the transactions which led to the purchase of the cashier's check in Green's name. After considering the briefs and additional materials submitted by Foley, the district court denied this second post-judgment motion, ruling that there was no evidence of fraud or misrepresentation, that the December 14 letter had no legal impact on the rights of the parties, and that Foley had not raised any facts or legal issues which, even if true, could save Foley from judgment.

Foley appealed the denial of this second post-judgment motion on November 6, 1987.

The two appeals were consolidated by the Court of Appeals on November 30, 1987.

Following oral argument, counsel for respondent wrote to the Court of Appeals, providing a portion of the Zimpel deposition. The deposition transcript was not part of the original record on appeal; however, the Circuit Court treated the letter as a motion to supplement the record, and granted it *sua sponte* and *ex parte*.[9]

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[9] Slip Op. at 8, n.6, Appendix p. 15a, *infra*. While the action was pending in the court of appeals, Foley took the deposition of Alan Silverstein and Sovran's commercial loan officer, David

[footnote continued]

In its September 13, 1988 decision, the United States Court of Appeals for the Fourth Circuit reversed the district court. Relying substantially on material submitted after the record was closed on Petitioner's successful motion for summary judgment, the Court of Appeals ruled that Green had defrauded the trial court by withholding evidence and misrepresenting the nature of the transaction by which the notes had been assigned to him. It concluded that the money to purchase the Sovran note had been supplied *via* the partnership account and that Foley, therefore, had a meritorious defense to Green's claim on the ground that the note had been extinguished. It concluded, in the alternative, that the note was extinguished because it had been paid by its "makers" (Zimpel and Silverstein). And it concluded that Green had "no intention" of disclosing the "true" manner in which he obtained the notes. The court instructed the district court to enter judgment for Foley. Circuit Judge Murnaghan thereafter sent a letter to the Disciplinary Board of the Pennsylvania State Bar, calling its attention to what he regarded as Green's professional misconduct. Appendix p. 102a-103a, *infra*.

On September 27, 1988, Green filed a Petition for Rehearing, Suggestion For Rehearing In Banc, And Motion To Supplement The Appellate Record. The Petition asked the court to reconsider the entry of judgment against Green, to permit him to offer evidence explaining the transaction, and why he had not committed fraud.

Gunn. Despite the fact that those depositions contradicted Respondent's representations of the "facts" based upon the Zimpel deposition, Respondent took no action to bring them to the attention of the court of appeals and petitioner's success on his motion for summary judgment precluded their introduction by him.

The Petition was denied on October 14, 1988. The circuit court denied Green's request for a stay of its mandate on October 19, 1988.

Green then sought a stay of the circuit court's decision from Chief Justice Rehnquist. The application for a stay was denied by the Chief Justice on October 25, 1988.

The district court entered summary judgment for Foley on October 28, 1988.[10]

REASONS FOR GRANTING THE WRIT

The decision of the fourth circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The court of appeals directed the district court to enter summary judgment against Green on the basis of an affirmative defense raised by Foley after summary judgment had been entered for Green. That affirmative defense had been summarily rejected by the district court without opening the record to permit Green to submit contradictory evidence. The court of appeals thus denied

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[10] On November 14, 1988, Respondent renewed his Motion For Rule 11 Sanctions prematurely filed on September 23, 1988. Respondent requested the district court to award $41,966.25 in fees and $4,567.43 in costs associated with the defense of this case, $28,895.25 in fees and $3,544.23 in costs associated with his defense of the case in state court, plus whatever other sanctions the court may deem just under the circumstances. On December 2, 1988, the district court awarded Foley $20,000 in sanctions against Green. On the same date, Petitioner's motion for relief from judgment was denied. Appendix p. 238a-239a, *infra*. Both parties have filed Notice of Appeal, Appendix pp. 240a, 244a, *infra*.

Green his constitutional right to be heard on the merits and to present any evidence in opposition to a resulting motion for Rule 11 sanctions against him. The decision of the court of appeals is contrary to numerous decisions by this Court holding such orders to be worthy of *certiorari* and uniformly subject to reversal.

The case before the fourth circuit was relatively straightforward. Green had obtained summary judgment against Foley based upon *pro forma* proof that he was a holder of the Sovran note under Virginia law.[11] The district court had also denied two post-judgment motions to open the judgment in order to consider Foley's claim that "new" evidence obtained in a related proceeding in state court demonstrated that Foley's obligation was discharged by Virginia Code sec. 8.3-603; and that he had been precluded from asserting this defense in a timely fashion because Green allegedly failed to plead and to provide evidence of facts which would have alerted Foley to the availability of an affirmative defense. The principal question on appeal, therefore, was whether the district court should have considered the merits of the issues raised in Foley's post-judgment assertion of an affirmative defense.

Inclined as it evidently was to grant relief, the appropriate procedure for the court of appeals to have followed was to remand the action to the district court for a hearing on the merits. This would have involved a determination of whether partnership funds had been used to purchase the note or whether Zimpel and Silverstein had intended to retire the Sovran debt, as Foley asserted on appeal; and, to reconsider its previous decision based upon those findings of fact. This is precisely the relief

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[11] Appendix pp. 104a, 106a, *infra*.

Foley sought; and it had the additional virtue of recognizing the time honored notion that evidence offered by one party is not necessarily conclusive – particularly in the absence of an opportunity for the opposing party to confront that evidence and to present his own contradictory evidence.[12]

Instead, the court of appeals violated a number of the most fundamental principles of civil procedure. First, it permitted the Record below to be irregularly "supplemented" in order to place before it the additional evidence proferred by Foley. It did so, at least in part, *sua sponte* and *ex parte*, without offering Green any notice or opportunity to comment. It then assumed the responsibility of a trial court, determining "facts" and drawing inferences based upon those "facts"; inferences which, contrary to principles learned in first year civil procecure, were viewed – in the context of summary judgment – in the light most *un*favorable to the opposing party.[13] The court then concluded that Green had engaged in a conspiracy to defraud Foley and the court; excoriated him for what it regarded as professional misconduct; and not

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[12] Indeed the court of appeals should have been particularly sensitive to the requirements of due process where the principal evidence upon which Foley relied was a *partial* transcript of the deposition of a witness who, at the time, was a defendant in an action brought by Green.

[13] Green was found by the court of appeals to be "part of a scheme [involving] Foley's business partners," Slip Op. at 2, p. 4a, *infra.*; a "Philadelphia lawyer" engaged in "sharp" practices, Slip Op. at 7, n.4, p. 13a, *infra.*; who "had no intention of disclosing the true manner in which he obtained the notes . . . ," Slip Op. at 9, p. 17a, *Infra.*; and "left his erstwhile clients exposed to double indemnity . . . ." Slip Op. at 6, n.2, p. 12a, *Infra. But see* Green Aff. at Pars. 38, 39.

only granted the requested relief from judgment, but directed that summary judgment be entered for Foley. Then – for good measure – it took steps to set in motion a disciplinary proceeding before the Pennsylvania Supreme Court, thereby jeopardizing not only Green's professional reputation, but his livelihood, as well. And it did all of this with full knowledge of the fact that Green was never provided an evidentiary hearing on the merits of Foley's post-judgment allegations.

Such conduct on the part of an appellate court runs so counter to principles of fundamental fairness that this Court has, in the past, seen fit – on circumstances far less egregious – to assert its supervisory power by granting *certiorari* and reversing the judgment of the appellate court.

Thus, in *Fountain v. Filsen*, 336 U.S. 681 (1949), this Court held it error for the circuit court to enter summary judgment against the party which prevailed below where "the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court." 336 U.S. at 683. The Court cited its previous decision in *Globe Liquor Co. v. San Ramon*, 332 U.S. 571 (1948), where it had held that judgment n.o.v. could not be given in the appellate court in favor of a party who was unsuccessful at the trial level. The Court noted that one reason for that holding was that "otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the Appellate Court discovered in his case." 336 U.S. at 683.

Similarly, in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), this Court reversed the order of an appellate court directing that judgment be

entered for a defendant on the basis of a defense which had been stricken by the district court below, noting:

> The direction to enter judgment for the defendant instead of a direction to grant a new trial denies plaintiff his right to introduce evidence in contradiction to that of the defendant on the issue of defendant's affirmative defense, a right which he would have exercised if the District Judge had ruled adversely to him on his motion to dismiss, and thus deprives him of his constitutional right to a jury trial on a practical issue.

356 U.S. at 532.

In *Florida Avocado Growers v. Paul*, 373 U.S. 132 (1963), the Court warned appellate courts against admitting,

> contested depositions and exhibits on appeal without ever affording the appellees an opportunity to argue their seemingly substantial objection. To assume the admissibility of the evidence under these circumstances would be to deny the appellees their day in court as to a disputed part of the case on which the trial court has never ruled because its view of the law evidently made such a ruling unnecessary.

373 U.S. at 156.

And, in *Singleton v. Wulff*, 428 U.S. 106 (1976), the Court repeated the general rule that "a federal appellate court does not consider an issue not passed upon below." 428 U.S. at 120. This rule is,

> essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

428 U.S. at 120, *quoting Hermel v. Helvering*, 312 U.S. 552 (1941).

All of these cases recognize that a litigant's Seventh Amendment right to a civil trial and Fifth Amendment right to due process are completely undermined by appellate decisions which reverse the result below under circumstances in which the party prevailing below was precluded – by its very success – from presenting its case on the merits.

Though reviewed and corrected by this Court, none of these cases involved the kind of damage to liberty and property interests which are the direct result of the fourth circuit's decision in this case. For, in addition to having lost his cause of action on the note, Green has been assessed $20,000 in Rule 11 sanctions on the ground that the findings of the court of appeals are conclusive. He also faces disciplinary proceedings before the Disciplinary Board of the Pennsylvania Supreme Court; proceedings which were instigated by a personal letter from Circuit Judge Murnaghan accompanied with a complimentary copy of his opinion, in which the decision of the court of appeals will constitute the principal, if not conclusive, evidence against him. If the fourth circuit's decision is allowed to stand, Green will simply *never* have had the opportunity to confront, cross-examine, or rebut the witnesses and the evidence against him. He will have been tried, convicted, and literally hung without ever having been heard in his own defense. Such a result cannot possibly do justice to the fundamental notions of due process upon which our system of justice rests. *See, e.g., Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Illinois Central R. Co.*, 291 U.S. 457 (1934); *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915).

Foley's affirmative defense can be viewed as "iron clad", Slip Op. at 4, p. 8a, *Infra.*, only because Green was deprived of the opportunity to introduce evidence to contradict it. Based on a partial transcript of the deposition testimony of an adverse witness in another proceeding and the assertions of Foley's counsel; acting on its own negative inferences drawn from an incomplete record; and in the absence of supportive findings by the district court below, the fourth circuit rushed to judgment and committed a gross injustice.

A full reading of the Zimpel deposition – not merely that *portion* provided by the court of appeals – demonstrates that Zimpel had no appreciation for the terms of art applicable to commercial paper and no real understanding of what occurred on that fateful 31st of December. Silverstein, who arranged the transaction with the bank, testified later that there was no intention to retire the Sovran note.[14] *See, e.g.* Silverstein Deposition at p. 110a-114a, *Infra.* Sovran's commercial loan officer testified that the money used to purchase the cashier's check on Green's behalf was debited by the bank directly from the personal accounts of Zimpel and Silverstein and, contrary to Zimpel's testimony, was never in the partnership account.[15] Gunn Deposition at pp. 117a-129a, *Infra.*

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[14] In view of the extraordinary nature of the action of the court of appeals, Petitioner believes it has no alternative but to request the Court to grant Petitioner leaves to supplement the Record in order to provide the Court with additional material information beyond the Record developed below, contained in pages 108a-245a of the Appendix.

[15] Absent discovery on these matters, the extent to which Green himself was in the dark as to what transpired in the transaction between Zimpel and Silverstein and Sovran is evidenced by the fact that he argued, on appeal, that the deposit about which Zimpel testified was a mistake, not that the funds deposited in the partnership account had been irrelevant to the transaction.

Petitioner firmly believes that the fourth circuit was completely wrong in its conclusion that the note was purchased with partnership funds, that Zimpel and Silverstein intended to retire the debt, that the debt had been paid by its makers,[16] and that there was an intent to withhold information from the district court.[17] A trial court may or may not have agreed. But Green was entitled, at the very least, to have those issues treated as issues of material fact in dispute and to have an opportunity to present evidence to rebut the evidence and argument of the Respondent. The denial of that opportunity deprived Green of his constitutional right to an evidentiary hearing before a fair and impartial tribunal, in violation of the Fifth and Seventh Amendments to the Constitution of the United States and the clear, consistent and unambiguous decisions of this Court.

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[16] In its haste, the court treated Silverstein and Zimpel as "makers" when, in fact, the partnership was the maker. Virginia law makes the partnership a separate and distinct legal entity. Va. Code Ann. sec. 50-8.1.

[17] Green's draft of his response to Foley's discovery was mailed by Green to his attorney on June 19, 1987. Not only was a document detailing the transaction included among the documents to be provided, it was also referenced throughout the interrogatory responses. The fourth circuit's inference that Green intended to withhold this evidence, drawn from the timing of its production and from what it perceived to be an "admission" by Green's counsel below, is completely erroneous, and without support in the factual record. Green responded to Foley's discovery request before oral argument on the cross-motions for summary judgment and several days *before* the due date.

CONCLUSION

For these various reasons, this petition for *certiorari* should be granted. The matter should be remanded to the district court for appropriate disposition, after a full development of the facts related to Respondent's affirmative defense and claim that Petitioner intentionally withheld material evidence.

Respectfully submitted,

PHILIP L. CHABOT, JR.
GRAD, TOOTHMAN, LOGAN & CHABOT, P.C.
Suite 800
1990 M Street, N.W.
Washington, D.C. 20036
(202) 737-5046

Counsel of Record